NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

JOYCE WILLIAMS,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 1999-0102
v.	)	
	)	
KMART CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

APPEARANCES:

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Attorneys for Defendant

MEMORANDUM OPINION

Finch, C. J.

Presently before the Court is Defendant Kmart Corporation's Partial Motion to Dismiss Plaintiff's First Amended Complaint. For the reasons expressed below, the Court will grant in part and deny in part Defendant's motion.

I. Background

Plaintiff's First Amended Complaint alleges the following facts. On or about August 4, 1998, Defendant hired Plaintiff Joyce L. Williams, a black woman, as the Human Resource Manager for Defendant's St. Croix store. Her duties consisted of extensive record-keeping for over 200 employees and filing of reports. Plaintiff was offered and paid $7.00 per hour for this position; a substantially lower rate than that of a white male manager, Michael Smith, who was paid $9.00 an hour and hired on or about the same time. When Plaintiff confronted Defendant's supervisor with a request for equal pay and with the fact of the pay discrimination, she was told to "take it or leave it." Plaintiff's supervisor failed to conduct an investigation regarding her complaint of discrimination.

Plaintiff was forced to resign due to Defendant's refusal to compensate her on an equal basis with white males in similar management positions. The alleged constructive discharge occurred on October 1, 1998. She subsequently filed a claim with the Equal Employment Opportunity Commission ("EEOC") on October 21, 1998 and received a right-to-sue letter on May 3, 1999.

On July 23, 1999, Plaintiff submitted her First Amended Complaint alleging discrimination in violation of Title VII of the Federal Civil Rights Act of 1964 (Count 1); violations of the Civil Rights laws of the Virgin Islands, 10 V.I.C. §§ 1-11 and 24 V.I.C. §§ 451-462 (Count II); violation of wrongful discharge laws of the Virgin Islands, 24 V.I.C. §76 *et seq*. (Count III); intentional and negligent infliction of emotional distress (Count IV); and punitive damages (Count V). Defendant subsequently filed the instant Motion to Dismiss Counts II, III and V for failure to

state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6).

II. Analysis

A. Standard of Review

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendant must meet a high standard in order to have a complaint dismissed for failure to state a claim upon which relief may be granted. In ruling on a motion to dismiss, a court must construe the complaint's allegations in the light most favorable to the plaintiff and all well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. Bontkowski v. First National Bank of Cicero, 998 F.2d 459, 461 (7th Cir.), cert. denied, 510 U.S. 1012 (1993). The allegations of a complaint should not be dismissed for failure to state a claim "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Nonetheless, in order to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. Lucien v. Preiner, 967 F.2d 1166, 1168 (7th Cir.), cert. denied, 506 U.S. 893 (1992).

Furthermore, in reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, the Court is limited to the allegations contained in the pleadings themselves. Documents incorporated by reference into the pleadings and documents attached to the pleadings as exhibits are considered part of the pleadings for all purposes. Fed.R.Civ.P. 10(c). Additionally, "[d]ocuments that a defendant attaches to a motion to dismiss are considered a part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." Venture

Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir.1993). With these principles in mind, the Court now turns to the instant motion.

B. Count II: Violation of the Civil Rights Laws of the Virgin Islands

In Count II of her First Amended Complaint, Plaintiff alleges that Defendant's actions violated the Virgin Islands Civil Rights Statutes pursuant to 10 V.I.C. §§ 1-11 ("Chapter 1") and 24 V.I.C. §§ 451-462 ("Chapter 17"). Defendant argues, and the Court agrees, that Plaintiff may not directly bring to the District Court a claim of discrimination pursuant to Chapter 17, because Chapter 17 does not provide Plaintiff with a private cause of action.[1]

In Hazel v. Executive Airlines, Inc., 886 F. Supp. 526 (D.V.I. 1995), this Court concluded that Chapter 17 does not create a private right of action; rather, it creates a limited right of action in the nature of a writ of review. This Court based its decision primarily on the clear language of 24 V.I.C. § 457(a). Section 457(a) provides:

> Any person aggrieved by a final order of the department granting or denying in whole or in part the relief sought may obtain a review of such order by filing in a court of competent jurisdiction, within 30 days of its issuance, a written petition praying that such decision of the department be modified or set aside.

24 V.I.C. § 457(a). Further, 24 V.I.C. § 458 provides, in pertinent part, that "the department [of Labor] may petition any court of competent jurisdiction for the enforcement of any order issued pursuant to this chapter . . . ." Thus, this Court concluded that "Chapter 17 envisions a private right of action for the very limited purpose of modifying or setting aside a final order of the Virgin

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[1] Defendant does not challenge Plaintiff's claim with respect to 10 V.I.C. §§ 1-11, and rightly so, because the Third Circuit has held that Chapter 1 of Title 10 provides Plaintiff with a private cause of action. See Figueroa v. Buccaneer Hotel, Inc., 1999 WL 609263 (3d Cir. (Virgin Islands) (August 13, 1999)). Accordingly, because Plaintiff may still pursue that portion of Count II alleging a violation of 10 V.I.C. §§ 1-11, said Count will not be dismissed.

Islands Department of Labor ["DOL"]. Only the [DOL] . . . may petition a court of competent jurisdiction for enforcement of its final orders. Nowhere in Chapter 17 does the statute establish a general, private right of action." Hazel 886 F. Supp. at 527.

Plaintiff in the instant case, like the plaintiff in Hazel, filed an administrative discrimination complaint in the DOL pursuant to 24 V.I.C. § 453. However, no hearing was held on the matter and no final order has been issued by the DOL. Accordingly, Plaintiff cannot utilize Section 457 to modify or set aside an order, because no order was issued.

Next, Plaintiff contends that Samuel v. Virgin Islands Tel. Corp., 12 V.I. 64 (D.V.I. 1975), supports her contention that she has a private of right of action under Chapter 17.[2] In Samuel, this Court found that the plaintiffs could bring their claim directly before the court because the DOL had failed to make a prompt investigation into the matter. The Court reasoned as follows:

> Section 452 of Title 24 speaks in terms of a "prompt" investigation by the [DOL] and an "immediate endeavor" to eliminate any unlawful discrimination revealed by the investigation. Sections 453-55 do not make mention of time constraints upon the Department.
>
> Generally, speaking, where a statute imposes no time limit on a governmental agency to perform a duty, a "reasonable time" will be imposed by a court. Here, in light of the language of § 452 and the nature of the activity of Chapter 17 of Title 24 seeks to prevent, it would not be improper to expect the [DOL] to act in a prompt fashion.
>
> As of the date of this memorandum, the [DOL] has neither made an investigation, held a

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[2] Additionally, Plaintiff erroneously argues that Codrington v. Virgin Islands Port Auth., 911 F. Supp. 907 (D.V.I. 1996), supports her contention that there exists a private right of action under Chapter 17. Codrington does not involve a claim under Chapter 17—it involves a claim under Title 10. Accordingly, Plaintiff's discussion of this case does nothing to rebut Defendant's argument for dismissal.

> hearing, nor issued any findings or orders of its own, despite the fact that plaintiffs' complaint was filed with that agency more than two years ago. Clearly, the [DOL] has not acted within a "reasonable time," let alone "promptly." Therefore, since plaintiffs' attempts to exhaust the administrative remedies provided to them under Title 24 have proven futile, I see no reason to require them to continue to wait for a response from, or to refile with, the [DOL].

Samuel, 12 V.I. at 75 (citations omitted).

Samuel is distinguishable from the case at bar, because here the DOL acted promptly in responding to Plaintiff's claim. Specifically, on or about October 21, 1998, Plaintiff filed her administrative claim with the DOL. Immediately thereafter, on or about October 21, 1998, the DOL, in furtherance of its investigatory powers and duties pursuant to Chapter 17, requested that Defendant provide a "notarized statement which addresses each and every paragraph and/or [sic] specifically set forth in the charge." DOL Letter to Def., dated October 21, 1998, attached as Ex. "A" to Def.'s Reply. On or about November 17, 1998, Defendant filed its response to the charge.

Unlike the Samuel case, at the time the instant motion was filed, it had been less than one year since Plaintiff's claim was filed with the DOL. Moreover, in Samuel, the DOL failed to respond to the plaintiffs' claims whatsoever. Whereas, in the instant case, the DOL immediately and promptly responded to Plaintiff's claim in the nature of its request for information from Defendant. For these reasons, the Court finds that Plaintiff has failed to prove that exhaustion of her administrative remedies would have been futile. Accordingly, the Court will dismiss that portion of Count II alleging a violation pursuant to Chapter 17, 24 V.I.C. §§ 451-462.

C. Count III: The Wrongful Discharge Act, 24 V.I.C. § 76 *et seq.*

Defendant argues that Count III of Plaintiff's Amended Complaint should be dismissed because a constructive discharge claim is not cognizable under the Virgin Islands Wrongful

Discharge Act ("VIWDA"). The VIWDA provides that although an employer is authorized to discharge an employee for certain enumerated reasons such as willful and intentional disobedience or continuous absences, "[a]ny employee discharged for reasons other than those stated in subsection (a) of [24 V.I.C. § 76] shall be considered to have been wrongfully discharged." 24 V.I.C. § 76.[3] Plaintiff contends that because the language of § 76 creates a presumption that an

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[3] 24 V.I.C. § 76 provides, in its entirety:

> (a) Unless modified by union contract, an employer may dismiss any employee:
> (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
> (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
> (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
> (4) who willfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
> (5) who performs his work assignments in a negligent manner;
> (6) whose continuous absences from his place of employment affect the interests of his employer;
> (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
> (8) who is dishonest; or
> (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.
> (b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.
> (c) *Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged*; however, nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protect by this title.

24 V.I.C. § 76 (1997 & 1999 Supp.) (emphasis added).

employee is wrongfully discharged if they are discharged for any reason other than one enumerated under the statute, an employee who is constructively discharged is therefore wrongfully discharged.

Plaintiff's interpretation of 24 V.I.C. § 76 is contrary to the DOL's interpretation of the statute. The DOL has interpreted § 76 to mean that "only terminations from employment are cognizable under the Act, not constructive discharges." Cotto v. Kmart, Virgin Islands Department of Labor Wrongful Discharge Case No. WD-029-98-STX (April 1, 1998) (emphasis in original); see also Samuel v. Wooley's d/b/a Grand Union Supermarket, Virgin Islands Department of Labor Wrongful Discharge Case No. WD-232-93-STX (March 2, 1994); see also Sheatz v. Four Star Aviation Co., Inc., Virgin Islands Department of Labor Wrongful Discharge Case No. WD-112-93-STT (May 4, 1994).

The Third Circuit has held that "the interpretation of a statutory scheme by the administrative agency charged with its enforcement is entitled to great deference. . . . [C]ourts are obligated to regard as controlling a reasonable, consistently applied administrative interpretation." Abramson v. Georgetown Consulting Group, Inc., 765 F. Supp. 255 (3d Cir. 1991) (citations omitted). In regard to the statute in question, the DOL has consistently held that a claim of constructive discharge is not cognizable under the VIWDA. See Cotto, supra; Samuel v. Wooley, supra; Sheatz, supra. Furthermore, DOL's interpretation of the statute is not unreasonable based on the plain language of the Act. Finally, even if the Court finds that the VIWDA could be interpreted as Plaintiff suggests, the Third Circuit has stated that where "the language of a statute . . . is susceptible of two constructions, a long continued and unvarying construction applied by

administrative officials is a persuasive influence in determining the judicial construction, and should not be disregarded except for the strongest and most urgent reasons." Abramson, 765 F. Supp. at 259 (quoting Shapiro v. City of Baltimore, 186 A.2d 605, 614 (1962)).

Plaintiff erroneously argues that the administrative agency decision does not control the outcome of the instant motion because it conflicts with established territorial and federal Third Circuit law. In support of Plaintiff's argument, she submits the following two cases: Schafer v. Board of Public Educ., 903 F.2d 243 (3d Cir. 1990) and The Village, Virgin Islands Partners in Recovery v. Government of the Virgin Islands, 39 V.I. 109 (Terr. Ct. 1998). Neither of these cases addresses the issue of whether a claim of constructive discharge is cognizable under the VIWDA. In Schafer, the court merely addresses the issue of when an employer's conduct amounts to constructive discharge. The Schafer court does not discuss the doctrine of constructive discharge in the context of the VIWDA. In Village, the claimant is not constructively discharged—she is terminated. Moreover, Village does not discuss the concept of constructive discharge; rather, the Territorial Court addresses the allocation of the burden of proof in a wrongful discharge hearing.

Therefore, absent any local or federal law to the contrary and in light of the deference that must be given to the DOL's interpretation, the Court finds that Plaintiff's constructive discharge claim is not cognizable under the VIWDA.[4] Accordingly, Count III of Plaintiff's First Amended

[4] Because the Court finds that Plaintiff's constructive discharge claim is not cognizable under the VIWDA, the Court need not address Defendant's argument that the conduct complained of is inadequate to support such a claim.

Complaint will be dismissed.[5]

D. Count V: Punitive Damages

Finally, Defendant argues that Count V of Plaintiff's First Amended Complaint must be dismissed because in Count V Plaintiff merely states that she is seeking punitive damages. According to Defendant, such a request is insufficient to support an independent count in a complaint. The Court disagrees.

Plaintiff is correct in her argument that punitive damages are available to a plaintiff who proves a violation of Title VII, see Kolstad v. American Dental Assoc., 527 U.S. 526 (1999), as well as to a plaintiff who suffers intentional infliction of emotional distress, see Codrington 33 V.I. at 252, or another intentional tort, see White v. S & E Bakery, Inc. 26 V.I. 87, 91 (Terr. Ct. 1991). The fact that Plaintiff has stated her claim for punitive damages in a separate count in the Amended Complaint does not affect the claim as to require dismissal. In Count V, Plaintiff realleges every claim made in the Complaint prior to that claim, which itself creates an adequate claim.

III. Conclusion

In sum, that portion of Count II alleging a violation of 24 V.I.C. §§ 451-462 (Chapter 17) is dismissed because (1) Chapter 17 does not create a private cause of action, and (2) Plaintiff has not proven that exhaustion of her administrative remedies under said Chapter would be futile.

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[5] Additionally, Defendant argues that Count III should be dismissed because the VIWDA has been federally preempted by this Court in Bell v. Chase Manhattan Bank, 40 F. Supp. 2d 307 (D.V.I. 1999). Since Defendant filed the instant motion, the Third Circuit has specifically held in St. Thomas–St. John Hotel & Tourism Assoc., Inc. v. Government of the United States Virgin Islands, 218 F.3d 232 (3d Cir. 2000), that the VIWDA is not federally preempted.

However, that portion of Count II alleging a violation of 10 V.I.C. §§ 1-11 is not dismissed, because Title 10 does provide Plaintiff with a private right of action. Count III of the Amended Complaint is dismissed because a claim of constructive discharge is not cognizable under the VIWDA. Finally, Count V of the Complaint is not dismissed because Plaintiff has stated a claim for punitive damages. An appropriate Order is attached.

ENTER:

DATED: March ____, 2001

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Wilfredo F. Morales
Clerk of Court
by: _____
Deputy Clerk

NOT FOR PUBLICATION

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JOYCE WILLIAMS,	)	
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Plaintiff,	)	
	)	CIVIL NO. 1999-0102
v.	)	
	)	
KMART CORPORATION,	)	
	)	
Defendant.	)	
	)	

ORDER

For the reasons expressed in the attached Memorandum Opinion, it is hereby

ORDERED that Defendant's Partial Motion to Dismiss is **GRANTED** in part and **DENIED** in part. The Court grants Defendant's motion as to Count III and denies the motion as to Count V. As to Count II, the Court dismisses Plaintiff's claim brought pursuant to 24 V.I.C. §§ 451-462, but because Plaintiff may proceed on her claim brought pursuant to 10 V.I.C. §§ 1-11, the Court does not dismiss Count II in its entirety.

ENTER:

DATED: March ____, 2001

_____
RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Wilfredo F. Morales
Clerk of Court
by: _____
Deputy Clerk

cc: Glenda Cameron, Esq.
Bennett Chan, Esq.

The Honorable Jeffrey L. Resnick, U.S. Magistrate Judge